UNITED STATES BANKRUPTCY COURT PH-18D
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT HAMMOND

IN RE:	)	
JAMES LEE HOBSON	)	
SHIRLEY A. HOBSON	)	BANKRUPTCY NO. 04-64531
	)	
Debtors	)	

MEMORANDUM OPINION AND ORDER

CitiFinancial Mortgage Company ("Movant") on June 22, 2005, filed a Motion to "Reconsider" the Order of this Court dated March 24, 2005, set out upon a separate document pursuant to Fed. R. Bk. P. 9021, and entered of record by the Clerk on the Docket on the 24th day of March, 2005, pursuant to Fed. R. Bk. P. 5003(a) ("Order"). That Order confirmed the Chapter 13 Plan filed by the Debtors on September 9, 2004. The Motion by the Movant alleges as follows:

> 1. James and Shirley Hobson executed and entered into a Note and Mortgage with Citifinancial on April 29, 1994. CitiFinancial is a secured creditor of the Debtors in the Real Estate commonly known as 5200 W. 4th Place Gary, IN 46404 ("the Real Estate"). A true and exact coy of the Note is attached as Exhibit "A".
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> 2. Subsequently on March 18, 2003 the Debtors executed and entered into a loan modification to save the Real Estate and as a result their monthly payments were reduced and the mortgage was extended to year 2018. A copy of the loan modification is attached as Exhibit "B".
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> 3. Thereafter the Debtors filed a Chapter 7 Bankruptcy proceeding as case No. 03-61618-JPK and obtained their discharge on July 15, 2003.
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> 4. In the Chapter 7 Case, the Debtors listed the value of the Real Estate as $38,000.00.
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> 5. CitiFinancial is the holder of the first Mortgage on the Real Estate and is currently owed a balance of $36,042.08 as of the Debtors current bankruptcy

filing.

6. The Debtors have improperly valued the Real Estate at $20,000.00 and have improperly reduced CitiFinancial's Mortgage to $20,000.00, contrary to 11 USC §1322.

7. Pursuant to 11 USC §1322 the Debtors, are required to pay the first Mortgage in full on the Real Estate. In addition, the Real Estate is valued at $44,000.00 substantially more that $20,000.00 set for in their Plan. A copy of Appraisal is attached as Exhibit "C".

The Court takes judicial notice of the record in this case and finds that on September 23, 2004 the Movant filed a Secured Claim in the amount of $43,227.15. This Claim had attached the Mortgage dated April 29, 1994, as set out in Paragraph One of the Movant's Motion; however, this Claim makes no reference to the Mortgage dated March 18, 2003, as set out in Paragraph Two of the Movant's Motion. The Court takes further judicial notice that the Debtor's Plan filed on September 9, 2004 expressly provided for the "strip down" or "cram down" of the Movant's Secured Claim to $20,000.00. The Court takes further judicial notice that on October 5, 2004, the Movant filed its Objection to the Plan of the Debtors solely on the grounds that the Debtor's Plan did not cure a prepetition arrears Claim of the Movant in the sum of $3,655.34. This Objection did not object to the "strip down" or "cram down" of the Movant's Secured Claim. However, the Movant on January 28, 2005 filed its Motion to Withdraw said Objection, and by Order dated and entered on February 1, 2005, the Court granted the Motion of the Movant to withdraw its Objection.

Said Motion is not accompanied by a separate brief or any appropriate affidavit or other materials in support of thereof as required by N.D. Ind. L.B.R. B-9023-1.[1] In addition, the

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[1] N.D. Ind. L.B.R. B-9023-1 provides as follows:

Movant did not file a separate request for oral argument as required by N. D. Ind. L.B.R. B-7007-2(b), as made applicable by N. D. Ind. L.B.R. B-9023-1(c). Accordingly, the Movant has waived any request for hearing and oral argument as to the Motion and the opportunity to submit a brief in support of its Motion.

The Bankruptcy Court no longer has an inherent power to reconsider its prior orders, rather its post-judgment reconsideration power is controlled by Fed. R. Bk. P. 7052 applying

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Post Judgment Motions

(a) Any motion filed after the entry of a final judgment or order, whether filed pursuant to Fed. R. Bankr. P. 9023 or Fed. R. Bankr. P. 9024, shall be accompanied by a separate supporting brief and any appropriate affidavits or other materials in support thereof. The failure to submit a supporting brief will be deemed a waiver of the opportunity to do so.

(b) Unless otherwise ordered by the court, no response to the motion is required.

(c) The provisions of N.D. Ind. L.B.R. B-7007-2 (oral argument on motions) apply to post judgment motions.

N.D. Ind. L.B.R. B-7007-2, as made applicable by N.D. Ind. L.B.R. B-9023-1, states as follows:

(a) Any motion filed within an adversary proceeding or a contested matter may be determined by the court without argument or hearing, following the expiration of the time for any response or reply provided for by these rules.

(b) A request for oral argument shall be filed separately and served along with any brief, response, or reply. The request shall specifically identify the purpose of the request and estimate the time reasonably required for any argument. The granting of any request for oral argument shall be discretionary with the court.

In addition, Fed. R. Bk. P. 9006(d) provides in part as follows:

When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 9023, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

Fed. R. Civ. P. 59(c), as made applicable by Fed. R. Bk. P. 9023 states as follows:

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by parties' written stipulation. The court may permit reply affidavits.

Fed. R. Civ. P. 52, Fed. R. Bk. P. 9023 applying Fed. R. Civ. P. 59, and Fed. R. Bk. P. 9024 applying Fed. R. Civ. P. 60. See In re Leiter, 109 B.R. 922, 924-25 (Bankr. N.D. Ind. 1990) (citing, Matter of Met-L-Wood Corp., 861 F.2d 1012, 1018 (7th Cir. 1988)).

The Federal Rules do not contemplate Motions for reconsideration. In re Curry and Sorenson, Inc., 57 B.R. 824, 827 (9th Cir. BAP 1986). Motions to reconsider have been traditionally treated as motions to alter or amend under Rule 59(e), if the motion questions the correctness of the Court's decision. Id. The Motion does not assert whether relief is being sought pursuant to Fed. R. Civ. P. 52, as made applicable by Fed. R. Bk. P. 7052 and Fed. R. Bk. P. 9014, Fed. R. Civ. P. 59, as made applicable by Fed. R. Bk. P. 9023, or Fed. R. Civ. P. 60, as made applicable by Fed. R. Bk. P. 9024. The Order Confirming the Debtor's Plan was a final appealable order.[2]

Section 1327(a) states as follows:

> **(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.**

As observed by this Court in In re Glow, 111 B.R. 209 (Bankr. N. D. Ind. 1990), the confirmation of a plan binds both the debtor and his creditors to the plan provisions. Id. 111

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[2] Fed. R. Bk. P. 9001 "General Definitions" defines a "Judgment" at 9001(7) as "any appealable order."; Fed. R. Bk. P. 9002 relating to "Meanings of Words in the Federal Rules of Civil Procedure When Applicable to Cases Under the Code", defines "Judgment" at 9002(5) as "any order appealable to an appellate court." Fed. R. Bk. P. 7054(a) which applies Fed. R. Civ. P. 54(a) defines a "judgment" to include a decree and any order form which an appeal lies. Fed. R. Bk. P. 9014, applies Fed. R. Bk. P. 7054 to contested matters also. The Order in issue falls within the foregoing definitions. For cases discussing what constitutes a final appealable order, see, e.g., In re Stoecker, 5 F.3d 1022, 1027 (7th Cir. 1993); In re Irvin, 950 F.2d 1318, 1319 (7th Cir. 1991); In re Official Committee of Unsecured Creditors, 943 F.2d 752, 755 (7th Cir. 1991); In re Unroe, 937 F.2d 346, 348 (7th Cir. 1991); In re Sandy Ridge Oil Co., Inc., 807 F.2d 1332, 1334 (7th Cir. 1986); In re Matter of James Wilson Associates, 965 F.2d 160, 166-67 (7th Cir. 1992).

B.R. at 224 (collecting cases). Once a plan is confirmed neither a debtor nor a creditor can assert rights that are inconsistent with its provisions. Id. An order of confirmation is res judicata as to all issues that could have and should have been raised pertaining to the plan. Id. (collecting cases). Absent the showing of fraud, failure of a plan to comply with the requisites as to confirmation as found in §1325, when there has been no timely objection to the plan, does not constitute grounds to set aside an order of confirmation. Id. (citing In re Szostek, 886 F.2d 1405, 1408-10 (3rd Cir. 1989). See also, Goss v. Goss, 722 F.2d 599, 605 (10th Cir. 1983) ("Consequences of a final unappealed judgment on the merits [are not] altered by the fact the judgment may have been wrong." (quoting Federated Dept. Stores, Inc. v. Moitie, 452 U. S. 394, 398, 101 S. Ct. 2424, 2428, 69 L.Ed.2d 103 (1981). Accord: Matter of Chappell, 984 F.2d 775, 782 (7th Cir. 1993) (as a general rule, the failure to raise an objection or appeal from an order of confirmation should preclude attack on the plan or any provision therein as illegal in a subsequent proceeding) (collecting cases).

A Motion to Alter, Amend, or for a New Trial pursuant to Fed. R. Civ. P. 59, as made applicable by Fed. R. Bk. P. 9023, must be filed within ten (10) days from the date of entry on the docket sheet by the Clerk of the Final Judgment or Order. The Court lacks the power to extend or enlarge the time for such a motion. See Varhol v. National Railroad Passenger Corporation, 909 F.2d 1557, 1561 (7th Cir. 1990); Marane, Inc. v. McDonald's Corporation, 755 F.2d 106, 111 (7th Cir. 1985); Sinett, Inc. v. Blairex Laboratories, Inc., 909 F.2d 253 (7th Cir. 1990); Nugent v. Yellow Cab Company, 295 F.2d 794, 796 (7th Cir. 1961); In re B. J. McAdams, Inc., 999 F.2d 1221, 1223-25 (8th Cir. 1993); Bailey v. Sharp, 782 F.2d 1366, 1367-68 (7th Cir. 1986), appeal after remand, 811

F.2d 366 (7th Cir. 1986); In the Matter of Embrey, 56 B.R. 626, 627 (Bankr. W. D. Mo. 1986).

Because the Order dated March 24, 2005 that was set out on a separate document pursuant to Fed. R. Bk. P. 9021 and entered on the Docket Sheet by the Clerk on the 24th day of March, 2005, pursuant to Fed. R. Bk. P. 5003(a), it was a Final appealable Order on March 24, 2005. Thus, the last day to file a Motion for a new Trial, or to Alter or Amend said Order pursuant to the ten (10) day period as set out in Fed. R. Civ. P. 59, as made applicable by Fed. R. Civ. P. 9023, was April 4, 2005.[3] Because the Order was entered of record on the docket sheet by the Clerk on March 4, and became a final appealable order on that date, and the Motion was filed on June 22, 2005, or more than 10 days after the entry of the Order by the Clerk, the Court can only consider the Motion based on Fed. R. Civ. P. 60, as made applicable by Fed. R. Bk. P. 9024, as opposed to Fed. R. Civ. P. 59, as made applicable by Fed. R. Bk. P. 9023.[4]

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[3] **The time to file a Motion pursuant to Fed. R. Civ. P. 59 does not begin to run until the Judgment or Order has been both set out on a Separate Document pursuant to Fed. R. Bk. P. 9021, and the Judgment or Order is entered on the Docket Sheet by the Clerk pursuant to Fed. R. Bk. P. 5003(a). Only at that point is the Order a final appealable order. Fed. R. Bk. P. 9021 is an adaption of Fed. R. Civ. P. 58. Fed. R. Civ. P. 5003(a) is an adaption of Fed. R. Civ. P. 79. It should be noted that Fed. R. Bk. P. 9021 states that the reference to Fed. R. Civ. P. 79(a) should be read as a reference to Fed. R. Bk. P. 5003. Pursuant to Fed. R. Bk. P. 9021(a) a Judgment or Order is effective when entered pursuant to Fed. R. Bk. P. 5003(a). See Matter of Kilgus, 811 F.2d 1112, 1117 (7th Cir. 1987); Rosser v. Chrysler Corp., 864 F.2d 1299, 1305 (7th Cir. 1988).**

[4] The United States Court of Appeals, Seventh Circuit, in the case of United States v. Deutsch, 981 F.2d 299 (7th Cir. 1992), adopted a "bright-line" test, and concluded that all substantive motions challenging a judgment on the merits served [now filed] within ten days of the rendition of the judgment fall within Rule 59, and all substantive motions to alter or amend a judgment served [now filed] more than ten days after entry of the judgment are to be evaluated under Rule 60(b). Thus, untimely Rule 59 Motions will be analyzed under rule 60(b), and substantive motions served [now filed] from the eleventh day on must be shaped to the specific grounds for modification or reversal listed in Rule 60(b). Id., 981 F.2d at 300-02. See also, Easley v. Kirmsee, 382 F.3d 693, 696 (7th Cir. 2004); Mares v. Busby, 34 F.3d 533, 535 (7th Cir. 1994).

However, Rule 60(b) is not intended to correct errors of law made by the Court in the underlying decision which resulted in the final judgment. McKnight v. United States Stell Corp., 726 F.2d 333, 338 (7th Cir. 1985). A party "cannot avoid the time limits on filing an appeal by filing a Rule 60(b)(1) motion challenging the district court's legal rulings and then appealing from a denial of that motion." Id., (quoting, Bank of California, N.A. v. Arthur Anderson & Co., 709 F.2d 1174, 1178 (7th Cir. 1983)). The appropriate way to seek review of alleged legal errors is by timely appeal; a 60(b) motion is not a substitute for an appeal or a means to enlarge indirectly the time for appeal. Id., Kagan v. Caterpillar Tractor, 795 F.2d 601, 606 (7th Cir. 1986). Therefore, Rule 60(b) cannot be invoked by the Movant to attack any alleged error of law in the Confirmation Order entered on the 24th day of March, 2005.

The next query is this, whether any relief from said Order is available to the Movant under Rule 60(b). The Seventh Circuit has held that "[r]elief from a judgment under Rule 60(b) is an extraordinary remedy and is granted only in exceptional circumstances." United States v. One 1979 Rolls-Royce Comiche Convertible, 770 F.2d 713, 716 (7th Cir. 1985); C.K.S. Engineers, Inc. v. White Mountain Gypsum Company, 726 F.2d 1202, 1204 (7th Cir. 1983); Ben Sager Chemical International v. Targosz & Co., 560 F.2d 805, 809 (7th Cir. 1977).

The Supreme Court's "excusable neglect" definition in Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993), is used in Rule 60(b) determinations. See Robb v. Norfolk & Western R. Co., 122 F.3d 354, 358-363 (7th Cir. 1997) (analyzing the broader meaning of excusable neglect after Pioneer. Generally, a movant must show three elements to obtain relief: (1) "good cause"

for the default; (2) "quick action to correct it"; and (3) a "meritorious defense" to the complaint. Jones v. Phipps, 39 F.3d 158, 162 (7th Cir. 1994); Pretzel & Stouffer v. Imperial Adjustors, Inc., 28 F.3d 42, 45 (7th Cir. 1994); Breuer Electric Mfg. Co. v. Tornado Systems of America, Inc., 687 F.2d 182, 185 (7th Cir. 1982). The Motion by the Movant does not set out any factual or legal grounds whatsoever to set aside the Order dated March 24, 2005, based upon Fed. R. Civ. P. 60(b). Accordingly, said Motion is hereby DENIED. It is therefore,

ORDERED, ADJUDGED, AND DECREED, that the Motion filed on June 22, 2005, by CitiFinancial Mortgage Company for Relief from the Order of this Court entered on March 24, 2005, should be and is hereby DENIED.

The Clerk shall enter this Order upon a separate document pursuant to Fed. R. Bk. P. 9021.

Dated: July 1, 2005

JUDGE, U. S. BANKRUPTCY COURT

Distribution
Debtors
Attorney Kopko
Attorney Nehrig
Trustee
U. S. Trustee

Rev. 06/30/05